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## Criminal Justice Section Standards

### Defense Function

#### DEFENSE FUNCTION

#### PART I.

#### GENERAL STANDARDS

##### Standard 4-1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

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##### Standard 4-1.2 The Function of Defense Counsel

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

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#### **Standard 4-1.3 Delays; Punctuality; Workload**

(a) Defense counsel should act with reasonable diligence and promptness in representing a client.

(b) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance upon court and in the submission of all motions, briefs, and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.

(c) Defense counsel should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

(e) Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Defense counsel should not accept employment for the purpose of delaying trial.

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#### **Standard 4-1.4 Public Statements**

Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

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#### **Standard 4-1.5 Advisory Councils on Professional Conduct**

(a) In every jurisdiction, an advisory body of lawyers selected for their experience, integrity, and standing at the trial bar should be established as an advisory council on problems of professional conduct in criminal cases. This council should provide prompt and confidential guidance and advice to lawyers seeking assistance in the application of standards of professional conduct in

criminal cases.

(b) Communications between an inquiring lawyer and an advisory council member have the same attorney-client privilege for protection of the client's confidences as ordinarily exists between any other lawyer and client. The council member should be bound by statute or rule of court in the same manner as a lawyer is ordinarily bound in that jurisdiction not to reveal any disclosure of the client. Confidences may also be revealed, however, to the extent necessary:

(i) if the inquiring lawyer's client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council member, or

(ii) if the inquiring lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.

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#### **Standard 4-1.6 Trial Lawyer's Duty to Administration of Justice**

(a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by lawyers. Lawyers should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel.

(b) All such qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.

(c) Such qualified lawyers should not assert or announce a general unwillingness to appear in criminal cases. Law firms should encourage partners and associates to become qualified and to appear in criminal cases.

(d) Such qualified lawyers should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law, representing the accused is likely to result in an unreasonable financial burden on the lawyer, or the client or crime is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

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### **PART II.**

#### **ACCESS TO COUNSEL**

##### **Standard 4-Standard 4-2.1 Communication**

Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose.

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##### **Standard 4-2.2 Referral Service for Criminal Cases**

(a) To assist persons who wish to retain defense counsel privately and who do not know a lawyer or how to engage one, every jurisdiction should have a referral service for criminal cases. The referral service should maintain a list of defense counsel willing and qualified to undertake the defense of a criminal case; it should be so organized that it can provide prompt service at all times.

(b) The availability of the referral service should be publicized. In addition, notices containing the essential information about the referral service and how to contact it should be posted conspicuously in police stations, jails, and wherever else it is likely to give effective notice.

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#### **Standard 4-2.3 Prohibited Referrals**

(a) Defense counsel should not give anything of value to a person for recommending the lawyer's services.

(b) Defense counsel should not accept a referral from any source, including prosecutors, law enforcement personnel, victims, bondsmen, or court personnel where the acceptance of such a referral is likely to create a conflict of interest.

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### **PART III.**

#### **LAWYER-CLIENT RELATIONSHIP**

#### **Standard 4-3.1 Establishment of Relationship**

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

(b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration.

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#### **Standard 4-3.2 Interviewing the Client**

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

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#### **Standard 4-3.3 Fees**

(a) Defense counsel should not enter into an agreement for, charge, or collect an illegal or unreasonable fee.

(b) In determining the amount of the fee in a criminal case, it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the questions involved, the skill requisite to proper representation, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation, and ability of defense counsel, and the capacity of the client to pay the fee.

(c) Defense counsel should not imply that his or her compensation is for anything other than professional services rendered by defense counsel or by others for defense counsel.

(d) Defense counsel should not divide a fee with a nonlawyer, except as permitted by applicable ethical codes of conflict.

(e) Defense counsel not in the same firm should not divide fees unless the division is in proportion to the services performed by each counsel or, by written agreement with the client, each counsel assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all counsel involved, and the total fee is reasonable.

(f) Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(g) When defense counsel has not regularly represented the client, defense counsel should communicate the basis or rate of the fee to the client, preferably in writing, before or within a reasonable time after commencing the representation.

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#### **Standard 4-3.4 Obtaining Literary or Media Rights from the Accused**

Defense counsel, prior to conclusion of all aspects of the matter giving rise to his or her employment, should not enter into any agreement or understanding with a client or a prospective client by which defense counsel acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to the employment or proposed employment.

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#### **Standard 4-3.5 Conflicts of Interest**

(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business,

property, or personal interests.

(b) Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that:

(i) the several defendants give an informed consent to such multiple representation; and

(ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

(d) Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(e) In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

(i) the accused consents after disclosure;

(ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and

(iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.

(f) Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.

(g) Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.

(h) Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired



when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.

(i) Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such a prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship.

(j) Defense counsel should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.

(k) Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

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#### **Standard 4-3.6 Prompt Action to Protect the Accused**

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

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#### **Standard 4-3.7 Advice and Service on Anticipated Unlawful Conduct**

(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

(c) Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

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#### **Standard 4-3.8 Duty to Keep Client Informed**

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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#### **Standard 4-3.9 Obligations of Hybrid and Standby Counsel**

(a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

(b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

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### **PART IV.**

#### **INVESTIGATION AND PREPARATION**

#### **Standard 4-4.1 Duty to Investigate**

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

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#### **Standard 4-4.2 Illegal Investigation**

Defense counsel should not knowingly use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so.

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### Standard 4-4.3 Relations With Prospective Witnesses

(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) Defense counsel should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews, provided there is no attempt to conceal the fact of reimbursement.

(c) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(d) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give.

(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

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### Standard 4-4.4 Relations With Expert Witnesses

(a) Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, defense counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) Defense counsel should not pay an excessive fee for the purpose of influencing an expert's testimony or fix the amount of the fee contingent upon the testimony an expert will give or the result in the case.

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### Standard 4-4.5 Compliance With Discovery Procedure

Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

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### Standard 4-4.6 Physical Evidence

(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

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## PART V.

### CONTROL AND DIRECTION OF LITIGATION

#### Standard 4-5.1 Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

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#### **Standard 4-5.2 Control and Direction of the Case**

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

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### **PART VI.**

#### **DISPOSITION WITHOUT TRIAL**

##### **Standard 4-6.1 Duty to Explore Disposition Without Trial**

(a) Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

(b) Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

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##### **Standard 4-6.2 Plea Discussions**

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

(c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.

(d) Defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.

(e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

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## PART VII.

### TRIAL

#### Standard 4-7.1 Courtroom Professionalism

(a) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.

(b) Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

(c) When court is in session, defense counsel should address the court and should not address the prosecutor directly on all matters relating to the case.

(d) Defense counsel should comply promptly with all orders and directives of the court, but defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings.

(e) Defense counsel should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

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#### Standard 4--7.2 Selection of Jurors

(a) Defense counsel should prepare himself or herself prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of defense counsel should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

(c) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. Defense counsel

should not intentionally use the voir dire to present factual matter which defense counsel knows will not be admissible at trial or to argue counsel's case to the jury.

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#### **Standard 4-7.3 Relations With Jury**

(a) Defense counsel should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during the trial. Defense counsel should avoid the reality or appearance of any such communications.

(b) Defense counsel should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After discharge of the jury from further consideration of a case, defense counsel should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If defense counsel believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

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#### **Standard 4-7.4 Opening Statement**

Defense counsel's opening statement should be confined to a statement of the issues in the case and the evidence defense counsel believes in good faith will be available and admissible. Defense counsel should not allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

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#### **Standard 4-7.5 Presentation of Evidence**

(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

(b) Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) Defense counsel should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration of the case by the judge or jury until such time as a good faith tender of such evidence is made.

(d) Defense counsel should not tender tangible evidence in the presence of the judge or jury if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be

tendered by an offer of proof and a ruling obtained.

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#### **Standard 4-7.6 Examination of Witnesses**

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination.

(c) Defense counsel should not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify.

(d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

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#### **Standard 4-7.7 Argument to the Jury**

(a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.

(c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.

(d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

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#### **Standard 4-7.8 Facts Outside the Record**

Defense counsel should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

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#### **Standard 4-7.9 Post-trial Motions**

Defense counsel's responsibility includes presenting appropriate posttrial motions to protect the defendant's rights.

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**PART VIII.****AFTER CONVICTION****Standard 4-8.1 Sentencing**

(a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case, with the consent of the accused, be prepared to suggest a program of rehabilitation based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.

(c) Defense counsel should also insure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Where appropriate, defense counsel should attend the probation officer's interview with the accused.

(d) Defense counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a statement that might tend to prejudice an appeal.

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**Standard 4-8.2 Appeal**

(a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.

(b) Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal.

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**Standard 4-8.3 Counsel on Appeal**

(a) Appellate counsel should not seek to withdraw from a case solely on the



basis of his or her own determination that the appeal lacks merit.

(b) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

(c) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(d) Appellate counsel has the ultimate authority to decide which arguments to make on appeal. When appellate counsel decides not to argue all of the issues that his or her client desires to be argued, appellate counsel should inform the client of his or her pro se briefing rights.

(e) In a jurisdiction with an intermediate appellate court, counsel for a defendant-appellant or a defendant-appellee should continue to represent the client if the prosecution seeks review in the highest court, unless new counsel is substituted or unless the court permits counsel to withdraw. Similarly, in any jurisdiction, such appellate counsel should continue to represent the client if the prosecution seeks review in the Supreme Court of the United States.

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#### **Standard 4-8.4 Conduct of Appeal**

(a) Appellate counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts.

(b) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument.

(c) Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

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#### **Standard 4-8.5 Post-conviction Remedies**

After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other post-conviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a post-conviction proceeding unless counsel has agreed to do so. In other respects, the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

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**Standard 4-8.6 Challenges to the Effectiveness of Counsel**

(a) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.

(b) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.

(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.

(d) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.

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**For More Information****Criminal Justice Standards Committee**

For more information concerning the Criminal Justice Standards, please contact Susan Hillenbrand, Standards Project Director either through [e-mail](#), or telephone at (202) 662-1503.

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